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Supreme Court, U.S.
FILED
DEC 15 2008
OFFICE OF THE CLERK

No. 08-573

In the
# Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
*Petitioner*,

v.

MICHIGAN PUBLIC SERVICE COMMISSION and
THE DETROIT EDISON COMPANY,
*Respondents.*

*On Petition for Writ of Certiorari to the Michigan Court of Appeals*

## PETITIONER'S REPLY BRIEF

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## ARGUMENT IN REPLY

### I. This case involves a federal question as to whether the ratemaking powers of the state MPSC are preempted by federal law, and does not involve a fact-bound case under state law as argued by Respondent.

Respondent Detroit Edison Company ("DECo") erroneously asserts that this case[1] does not involve a federal preemption question, but rather, state law issues concerning whether the Michigan Public Service Commission ("MPSC") and lower Court lawfully determined, based upon the evidentiary record, that Respondent DECo was reasonable and prudent in continuing to pay fees under its breached Standard Contract, justifying unexamined recognition of the contract fees in retail rates regulated under Michigan law, and justifying rejection of other ratemaking remedies presented by Petitioner under all of the MPSC's comprehensive ratemaking authority.

Petitioner presented a preemption issue in another recent certiorari petition filed in this Court, which this Court recently denied.[2] Notably, however, this case

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[1] Petitioner's certiorari petition seeking review of July 3, 2007 Michigan Court of Appeals decision *In re application of Detroit Edison Company*, 276 Mich. App. 216, 740 N.W.2d 685 (2007), Appendix 1a-16a.

[2] Supreme Court Docket No. 08-246.

involves some differences from the *IM Power* case.[3] Admittedly, in both this case and *IM Power*, the utility argued in hearings and briefing before the presiding Administrative Law Judge ("ALJ") and the MPSC that the MPSC's ratemaking authority to review or address the cost of fees paid by the utilities under their Standard Contract (77a-118) for spent nuclear fuel ("SNF") disposal was preempted by federal law. However, in this case, unlike *IM Power*, the ALJ unquestionably ruled that MPSC ratemaking authority was preempted. The MPSC orders in this case then adopted this ALJ ruling.[4] This contrasts with the *IM Power* case where the lower Court claimed it need not rule upon the preemption issue because the MPSC did not do so (180a-195a, specifically 192a).

Secondly, the lower Court in this case simply affirmed the MPSC decision, thereby also erroneously upholding the preemption result, but without any reasoning or explanation, despite the extensive briefs filed by both Petitioner and Respondent before the lower Court with respect to the preemption issue. The Court in this case did so by simply adopting its *IM Power* case decision through the erroneous application of collateral estoppel, on an unforeseen sua sponte basis, without any input from the parties below. The lower Court did so despite binding published Michigan precedent that holds that collateral estoppel does not apply to cases arising from utility ratemaking.

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[3] The Michigan Court of Appeals is cited as *In re Application of Indiana Michigan Power Company*, 275 Mich. App. 369, 738 N.W.2d 289 (2007), Petitioner's Appendix 180a-195a.

[4] MPSC June 30, 2005 Order Denying Rehearing (17a-26a); MPSC November 23, 2004 Opinion and Order, (relevant portions), 27a-37a.

*Consumers Energy v. MPSC*, 707 N.W.2d 633 (2005). The Court in this case also failed to explain how collateral estoppel could apply here when, under its own finding in *IM Power*, the two cases are dissimilar on a key point (i.e. the Court in *IM Power* found that it need not rule on the preemption issue because the MPSC did not rule on the preemption issue, whereas in this (the DECo case), the opposite is true – the ALJ ruled that preemption applied and the MPSC orders adopted the ALJ's ruling).

Respondent DECo's brief attempts to claim that the case here was decided upon an evidentiary basis under state law, wholly aside from the preemption issue. The inescapable problem with this argument is that the MPSC orders made no specific findings upon any of the extensive evidence presented by Petitioner (or Respondent) before the agency.[5] And, of course, as noted, the lower Court also wholly avoided any review or discussion of any specific agency evidentiary findings (1a-16a, specifically 15a-16a).

Respondent DECo's arguments referencing its own witness' evidentiary discussion that DECo has been "reasonable and prudent" in continuing to pay SNF contract fees under a contract suffering from a long-term breach, and without any hint of conditions or protections of the contract fees being paid, based upon vague and unexplained concerns about such things as the risk of loss of its nuclear plant license, represents nothing more than DECo's counsel's post hoc briefing

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[5] The MPSC's sparse, conclusionary, non-evidentiary findings are found in the MPSC's order, dated November 23, 2004, (27a-37a) and order denying rehearing, dated June 30, 2005 (17a-26a).

arguments – these arguments do not represent evidentiary findings made by the agency, based upon the record evidence (in accordance with the duty assigned the agency under Michigan law[6]).

Respondent DECo's arguments that the MPSC simply found that DECo was reasonable and prudent based upon record evidence and the standards of state law are erroneous – the MPSC assigned by law to evaluate the evidence and make findings based thereon simply did not make such findings. The scantness of the MPSC's end-result driven disposition of the SNF fee cost and rate issues demonstrates instead that the basis for its *fait accompli* ruling and result was the MPSC's perception that its ratemaking powers with respect to said costs are preempted by federal law, and that the MPSC under our federal system is thereby powerless to protect ratepayers by invoking any of the range of ratemaking remedies presented in evidence by Petitioner.[7]

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[6] Art 6, Section 28 of the Michigan Constitution (175a) requires that Court review of MPSC decisions "shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law and in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record"; see also, Michigan Administrative Procedures Act, including Section 85, MCL 24.285 (172a).

[7] Record evidence of Petitioner expert witness (243a-295a), including "collect but protect remedies" (289a-295a), including rate investigation, SNF site decommissioning trust; SNF cost rates collected under a utility performance bond, insurance, among related remedies (all fully recognized by the Nuclear Regulatory Commission as additional financial assurances that state regulatory authorities may adopt).

Respondent DECo's other argument – essentially that DECo's reasonableness and prudence may be premised upon the Court's affirmance of the MPSC orders in the *IM Power* case is also unmeritorious. The reviewing Court under Michigan law is not empowered to make *de novo* factual findings. *Associated Truck Lines v. Public Service Commission*, 377 Mich. 259; 140 N.W.2d 515 (1966). The Court in this case must base its review upon the MPSC's evidentiary findings in this case, and the legal issues and findings made by the agency, and not upon the record in the *IM Power* case[8] Respondent DECo also avoids the legal reality that the scope of the MPSC's remedial ratemaking powers was also more extensive in this case compared to the *IM Power* case.[9]

Respondent DECo's argument (Brief in Opposition, pp 22-23) that a state law basis for the MPSC and lower Court result (and not preemption) may be found (assumed) based upon a theory that utility management actions must be presumed to be reasonable and prudent absent an "abuse of discretion" is simply not applicable under Michigan law. Unlike the "file and use" tariffs and ratemaking procedures used six or more decades ago, when the old cases cited by Respondent were decided, utilities under Michigan law since 1952 have been assigned the burden of proof

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[8] In *IM Power*, a portion of Petitioner's expert evidence was improperly stricken, whereas in this DECo case, all of Petitioner's expert evidence was admitted in the evidentiary record.

[9] In this case (DECo), the Commission's ratemaking powers were based upon all of the Commission's ratemaking statutes governing both base rates and Act 304 fuel-type costs, and the scope of ratemaking remedies were thus broader.

to file an application seeking the establishment of new rates, along with evidence to establish that its incurred costs result from reasonable and prudent action.[10] The MPSC, in turn, has the duty to make findings of fact and law based upon the "competent, material, and substantial evidence on the record as a whole",[11] which definitionally refers to not only the evidence presented by the utility but also that of intervenor ratepayer representatives like Petitioner here.

In this case, the utility failed to prove that it was reasonable and prudent in continuing to pay, indefinitely, and without protective conditions or protections, SNF fees under a contract that is in long-term breach. The MPSC then wholly dodged making any of the required findings of fact and law based upon the evidence on the record as a whole – including the evidence presented by respondent utility and of Petitioner (including Petitioner's various recommended ratemaking remedies designed to protect ratepayers with respect to the ongoing SNF fee costs).

Respondent DECo also appears to rely on the lower *IM Power* court decision as a basis to make up for the lack of findings of the agency below based upon the record in this case. This attempted transference is without merit for reasons in addition to that discussed above. Unlike *IM Power*, (which was only an Act 304

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[10] Section 6a, MCL 460.6a, (since 1952) 120a-123a; Section 6j *et seq.*, MCL 460.6j *et seq.*; (since 1982) 123a-136a.

[11] See FN 6, *supra*.

case) this case commenced as a consolidated base rate and Act 304 case, conducted pursuant to all of the comprehensive ratemaking powers of the MPSC. This case was also the subject of MPSC orders, Court appeals, and Court briefing and arguments, completed months before the *IM Power* case (although the lower Court held this case up to issue its *IM Power* decision first). This DECo case was the lead case that involved the SNF fee cost and rate issues (and remedies) and concerning the preemption issue as well. Respondent DECo erroneously attempts to ignore these realities, and to "bootstrap" the lower Court's *IM Power* decision as the basis supporting the MPSC's decision here (despite the broader evidentiary record and more comprehensive agency jurisdictional power applicable to this case).

Respondent DECo (Brief in Opposition, p 10) claims that "it is undisputed that a federal statute assesses the SNF fee", and then characterizes Petitioner's position as advocating that "Edison should stop paying the SNF fee" (DECo brief, pp 4, 9, 10, 18) or "that Edison could not recover SNF fee costs that it paid" (p 11). However, Respondent DECo fails to acknowledge Petitioner's consistent position throughout that the NWPA[12] did not address, let alone curtail or preempt, state ratemaking authority over DECo's cost of service when setting rates, and that the SNF fee established in 42 U.S.C. § 10222 did not control how that fee cost should be treated in DECo's rates given the long-term breach in the SNF disposal contract to which the fee was irrevocably linked. DECo's payment of the SNF

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[12] Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* (52a-76a).

fee was reciprocal to DOE's SNF disposal duties, as affirmatively declared by the U.S. Court of Appeals in *Indiana Michigan Power v. DOE*, 88 F.3d 1272 (1996) and *Northern States Power v. DOE*, 128 F.3d 754 (1997). Given this context, Petitioners asserted that, while DECo could continue to pay the fees, DECo was not reasonable and prudent in continuing to pay the fees indefinitely, without protections or conditions, in the face of DOE's ongoing breach of the reciprocal disposal duties under the contract. The current context of this issue is no different than if DECo continued to pay annually under a coal contract (and without protective conditions such as an escrow or lawsuit for restitution or specific performance, etc.) in a situation where the coal company never delivered any coal. Petitioners argued that the MPSC should act under its ratemaking powers to protect ratepayers regarding the ongoing SNF fees, by a range of alternative remedies (such as a rate disallowance, placement of SNF fee collections from ratepayers into an escrow trust, a more thorough rate investigation of the issue, etc.) in this situation. Respondent DECo's response to Petitioner throughout has been, predominantly, that the MPSC cannot act to protect ratepayers because the MPSC ratemaking powers are preempted with respect to the federally "mandated" SNF fee. DECo's erroneous legal position on this issue prevailed below, and was the driving basis for the ALJ, MPSC, and lower Court rulings below.

Respondent DECo's claim that the result in this case (and the agency's decision) below was not based upon federal preemption is also belied by the extensive arguments that Respondent DECo made before the ALJ, the agency, and the lower Courts, that MPSC ratemaking authority over the SNF fee cost and rate

issues was preempted by federal law. Respondent DECo, and other Michigan utilities, have repeatedly made these arguments in cases before the agency. Respondents' simplistic arguments have involved the theory that the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10101 *et seq.* (52a-76a) assesses and mandates the fee, apparently indefinitely, and without relevance to the contract performance required under the NWPA and Standard Contract (payment of fee in exchange for commencement of SNF disposal in 1998) and despite the long-term (and likely permanent) breach of performance under the Contract, and despite the federal Court of Appeals' holding that the payment of the fees was (and is) a reciprocal obligation to contract performance. *Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272 (1996).

The reality is that the preemption issue is the "800 pound" gorilla that drives the end-result of the MPSC's rulings refusing to consider ratemaking remedies to protect ratepayers with respect to the ongoing SNF fee costs incurred by utilities (despite the ongoing failure of performance under the contract). Respondent DECo is in error in suggesting that the result in this case would be the same without resolution of the preemption issue. The reality is that if the MPSC and lower Court were informed by this Court that federal preemption does not control the result, then proper review of the SNF fee cost issues and ratemaking remedies could then be undertaken.

## II. The MPSC and lower Court decisions below do not comport with decisions of this Court and the United States Court of Appeals.

This Court held in *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), that neither the Atomic Energy Act, 42 U.S.C. § 2011 nor the NWPA preempted a state agency's jurisdiction to regulate a retail nuclear utility with respect to the economic or environmental costs of nuclear energy.

In 1999, another federal court directly and extensively reviewed the NWPA and the Standard Contract, and found no language or intent by Congress to address (i.e. preempt) state ratemaking authority over a retail nuclear utility.[13]

The U.S. Court of Appeals in *Indiana Michigan Power Company v. DOE*, 88 F.3d 1272 (1996) held that the payment of fees under the Standard Contract and DOE's commencement of SNF disposal by January 31, 1998, involved a reciprocal obligation, and a *quid pro quo* of the contractual bargain inherent in the NWPA and Standard Contract. The Court's holding in *Indiana Michigan* was reaffirmed in the U.S. Court of Appeals decision in *Northern States Power v. DOE*, 128 F.3d 754 (1997).

The decisions of the ALJ, MPSC, and lower Court below adopting the utility's claim that MPSC ratemaking authority to review and adopt ratemaking

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[13] *Roedler et al. v. Dept of Energy, et al*, 1999 U.S. Dist Lexis 21613, unpublished, 205a-242a, affirmed, *Roedler et al. v. DOE et al.*, 255 F.3d 1347 (2001).

remedies with respect to the SNF contract fees is preempted by federal law ignores and eviscerates the federal Court holdings above. The rulings below also ignore the reality that nothing in the NWPA, court decisions, Standard Contract, or any other cited authority, establishes any intent to intrude into (let alone preempt) state ratemaking authority over retail utilities. By so doing, the decisions below effectively foreclose meaningful ratemaking review of the SNF fee cost issues on behalf of the retail ratepayers that the MPSC was established to protect. The decisions below also remove important incentives for utilities to invoke all appropriate remedies to protect the ongoing contract fee payments and to seek performance under the contract, or to otherwise enforce the contract.

## CONCLUSION

Petitioner requests this Honorable Court to grant the petition and review this case.

Respectfully submitted,

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Date: December 15, 2008